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COMMONWEALTH OF VIRGINIA

STATE CORPORATION COMMISSION

AT RICHMOND, January 19, 2000

COMMONWEALTH OF VIRGINIA, ex rel.

STATE CORPORATION COMMISSION

V.

JAMES HAROLD MALBAFF,  
THOMAS GREGORY COOK,

CASE NOS. SEC990073  
SEC990074

Defendants

SETTLEMENT ORDER

The Commission's Division of Securities and Retail Franchising ("Division") has instituted an investigation of the Defendants, James Harold Malbaff ("Malbaff") and Thomas Gregory Cook ("Cook") pursuant to § 13.1-518 of the Virginia Securities Act ("Act"), § 13.1-501 et seq. of the Code of Virginia.

As a result of its investigation, the Division alleges that in the offer and sale of securities: (i) Malbaff and Cook omitted to state the risk of the investments which was a material fact in violation of § 13.1-502(2) of the Act, (ii) Malbaff and Cook failed to provide investors with material disclosures in violation of § 13.1-502(2) of the Act, (iii) Malbaff and Cook transacted business as unregistered broker-dealers in violation of § 13.1-504A of the Act, (iv) Malbaff and Cook transacted business as unregistered agents in violation of § 13.1-504A of the Act, (v) Malbaff and Cook, as de facto partners, employed themselves as unregistered agents in violation of § 13.1-504B of

the Act, and (vi) Malbaff and Cook sold numerous unregistered securities in violation of § 13.1-507 of the Act.

The Defendants have cooperated with the Division by, among other things, providing documentary evidence and other materials requested by the Division and providing the Division relevant facts relating to themselves and Malbaff & Cook, an entity.

As a proposal for the sole purpose of a complete and final settlement of all matters arising from the allegations made against them, the Defendants, without admitting or denying any such allegations, have offered, and agreed to comply with, the following terms and undertakings:

(1) Within twenty-one (21) days of the date of this Settlement Order, Malbaff and Cook will send a written offer of rescission to each unpaid investor by certified mail, return receipt requested. Those investors who execute and accept such offer by mailing the notice by certified mail, return receipt requested to Malbaff and Cook on or before thirty (30) days after receipt thereof shall be reimbursed those funds provided by them to Malbaff and Cook for investment with simple interest at an annual rate of six percent on any outstanding balance calculated from the date of Malbaff and Cook's receipt of the funds. Within twenty-one (21) days of the date of this Settlement Order, Malbaff and Cook will each submit a separate affidavit attesting to the amount each investor invested, the date of the purchase, the amount that has already been refunded to each investor, the amount of principal still owed to each investor, the amount of interest owed to each investor, a copy of the offer of rescission mailed to each investor, the date and nature of each investor's response to the offer of rescission and a detailed

written monthly payment plan acceptable to the Division, showing who will be paid and in what amounts, each month with all investors to be paid within thirty-six (36) months of the date of this Settlement Order. A list of the names, addresses and outstanding principal amounts to be paid by the Defendants to each known investor who without their knowledge invested through Lytle Foglesong is attached to this Order. The following terms apply to the repayment schedule:

(i) The Defendants agree to make their first monthly payment thirty (30) days after the last day for return to them of the rescission offers by investors.

Subsequent payments will be due each thirty (30) days thereafter in each succeeding month until all payments have been made.

(ii) In the event any monthly payment is not received by an investor within fifteen (15) days after it is due, the full unpaid balance owed that investor shall become immediately due and payable plus court costs and reasonable attorney's fees incurred in collecting the unpaid balance, unless otherwise agreed to in writing by Malbaff and Cook and such investor.

(iii) Because of their fiduciary relationship with the investors, the Defendants agree that their payment obligations to investors who accept the offer of rescission as provided herein shall not be discharged in bankruptcy, in whole or in part.

(2) Evidence of compliance with the monthly payment plan described in paragraph (1) will be filed with the Division on January 1, 2001, January 1, 2002, and January 1, 2003. Such evidence will be in the form of an affidavit executed by Malbaff and a separate affidavit executed by Cook showing the name of each investor, the

amount of principal paid to each investor for the preceding year, the amount of interest paid to each investor for the preceding year, and copies of checks evidencing all payments.

(3) Pursuant to § 13.1-519 of the Act, Malbaff and Cook will be enjoined from violating §§ 13.1-502(2), 13.1-504A, 13.1-504B, and 13.1-507 of the Act.

(4) Malbaff and Cook will provide all current investors and all former investors with a copy of this Settlement Order.

(5) Pursuant to § 13.1-521 of the Act, Malbaff will pay to the Commonwealth a penalty in the sum of one million three hundred thousand dollars (\$1,300,000), with interest thereon at the rate of nine percent per year until paid, provided that this penalty and interest will be suspended and remitted upon the condition that Malbaff complies with the provisions of paragraphs (1), (2), (3), and (4) above. Should Malbaff fail to comply with paragraphs (1), (2), (3), or (4) above, then the full penalty and interest herein imposed shall become immediately due and payable.

(6) Pursuant to § 13.1-521 of the Act, Cook will pay to the Commonwealth a penalty in the sum of one million two hundred seventy thousand dollars (\$1,270,000), with interest thereon at the rate of nine percent per year until paid, provided that this penalty and interest will be suspended and remitted upon the condition that Cook complies with the provisions of paragraphs (1), (2), (3), and (4) above. Should Cook fail to comply with paragraphs (1), (2), (3), or (4) above, then the full penalty and interest herein imposed shall become immediately due and payable.

(7) Pursuant to § 13.1-518 A of the Act, Malbaff and Cook shall jointly pay to the Commission twelve thousand dollars (\$12,000) to defray the cost of the investigation.

(8) It is recognized and understood that if the Defendants fail to comply with any of the foregoing terms and undertakings, then the Commission reserves the right, the exercise of which right will not be contested by the Defendants, to take whatever action it deems appropriate, including, but not limited to, instituting a show cause proceeding under the Act or other applicable statutes based on such failure to comply, on the allegations contained herein and/or such other allegations as are warranted.

The Division has recommended that the Defendants' offer of settlement be accepted pursuant to the authority granted to the Commission in § 12.1-15 of the Code of Virginia.

THEREFORE, IT IS ADJUDGED AND ORDERED THAT:

(A) Pursuant to the authority granted to the Commission in § 12.1-15 of the Code of Virginia, the Defendants' offer of settlement is accepted;

(B) The Defendants shall fully comply with the aforesaid terms and undertakings of the settlement;

(C) Pursuant to § 13.1-521 of the Act, Malbaff will pay to the Commonwealth a penalty in the sum of one million three hundred thousand dollars (\$1,300,000), with interest thereon at the rate of nine percent per year until paid, provided that this penalty and interest will be suspended and remitted upon the condition that Malbaff complies with the provisions of paragraphs (1), (2), (3), and (4) above. Should Malbaff fail to

comply with paragraphs (1), (2), (3), or (4) above, then the full penalty and interest herein imposed shall become immediately due and payable.

(D) Pursuant to § 13.1-521 of the Act, Cook will pay to the Commonwealth a penalty in the sum of one million two hundred seventy thousand dollars (\$1,270,000), with interest thereon at the rate of nine percent per year until paid, provided that this penalty and interest will be suspended and remitted upon the condition that Cook complies with the provisions of paragraphs (1), (2), (3), and (4) above. Should Cook fail to comply with paragraphs (1), (2), (3), or (4) above, then the full penalty and interest herein imposed shall become immediately due and payable.

(E) Pursuant to § 13.1-518 A of the Act, Malbaff and Cook shall jointly pay to the Commission twelve thousand dollars (\$12,000) to defray the cost of the investigation.

(F) The sum of twelve thousand dollars (\$12,000) tendered by Malbaff and Cook contemporaneously with the entry of this Order is accepted in full satisfaction of Section E herein above.

(G) Pursuant to § 13.1-519 of the Act, Malbaff and Cook are hereby enjoined from violating §§ 13.1-502(2), 13.1-504A, 13.1-504B and 13.1-507 of the Act.

(H) The Commission shall retain jurisdiction in this matter for all purposes, including the institution of a show cause proceeding as described above, or taking such other action it deems appropriate, on account of the Defendants' failure to comply with the terms and undertakings of the settlement.

(I) Entry of the Settlement Order shall not confer any right of action upon any investor, nor deprive such investor of any existing right of action. Acceptance by any

investor of an offer of rescission made pursuant to this Order, however, shall bar the investor from seeking rescission or restitution other than that so accepted.

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ADMISSION AND CONSENT

The Defendants, James Harold Malbaff and Thomas Gregory Cook, admit the jurisdiction of the State Corporation Commission of Virginia as to the parties and the subject matter hereof and, without admitting or denying the allegations made herein by the Division of Securities and Retail Franchising, hereby consent to the form, substance and entry of the foregoing Settlement Order.

The Defendants further state that no offer, tender, threat or promise of any kind whatsoever has been made by the Commission or any member, subordinate, employee, agent or representative thereof in consideration of the foregoing Settlement Order.

Dated: \_\_\_\_\_

James Harold Malbaff

Dated: \_\_\_\_\_

Thomas Gregory Cook

Seen and Approved By:

\_\_\_\_\_  
Joseph J. Contrucci, Esquire  
PO Drawer 400  
Gainesville, Virginia 20156-0400  
Counsel for the Defendants